3.

SUPREME COURT OF THE UNITED STATES.

No. 3.

LESSEE OF MARGARET LATIMER ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIAM POTEET.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Declaration - - - - - - -	1	3
Notice to William Poteet and service - - -	4	4
Appearance of Defendant - - - - -	5	5
Issue joined, &c. - - - - - -	5	5
Jury sworn—Verdict—Judgment - - -	7	6
Bill of Exceptions - - - - - -	8	7
Bond - - - - - - - -	17	10
Certificate of Clerk - - - - - -	18	10
Writ of Error - - - - - - -	19	11

Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA, *North Carolina District.*

Be it remembered, that heretofore, to wit, at a circuit court of the United States, begun and held in the city of Raleigh, on the 12th day of November, in the year of our Lord one thousand eight hundred and twenty-eight, the honorable John Marshall, Chief Justice of the United States, and the honorable Henry Potter, district judge of the United States for the district of North Carolina, being present:

Beverly Daniel, esquire, marshal for the district of North Carolina, returned into court the following writ in ejectment, viz:

FIFTH CIRCUIT OF THE UNITED STATES, *North Carolina District, to wit:* } *May Sessions*, 1828.

John Doe, a citizen of the State of Pennsylvania, by his agent and attorney, complains of Richard Roe, a citizen of the State of North Carolina, in a plea of trespass in ejectment, for that Margaret Latimer, James Latimer, Elizabeth Latimer, and Margaret Latimer, jr., executors of George Latimer, and legal representatives of William Cathcart, Dorithy Dale, John M. Dale, Edward C. Dale, Sarah Dale, and Elizabeth Dale, heirs and representatives of Richard Dale, John R. Latimer, Sarah Latimer, Mary R. Latimer, Henry Latimer, and James Latimer, heirs and representatives of Henry Latimer, citizens of the State of Pennsylvania, on the first day of July, 1825, in said district of North Carolina, demised, and to farm let, unto the said John Doe, one messuage and a certain tract or parcel of land, containing forty-nine thousand nine hundred and twenty acres, lying on the waters of Scott's creek and Tuckesege river, in the county of Haywood, in the district aforesaid, and bounded as follows, to wit: beginning at a locust stake and ash and locust, near the head water course of Scott's creek, in a line run for John G. Blount, and running due south 240 poles to a large poplar, then on Blount's line, south 38, east 290 poles, to a chesnut, then due south, crossing Scott's creek and several branches, 702 poles to an ash, then south 24, east 360 poles to a locust, then south 38, east 780 poles, crossing the waters of Cain creek of Tuckesege river, to a hickory on Blount's line, then due west by his own entries of land, crossing Cain creek and several branches, 4119 poles to a stake, then due north 2320 poles to a stake, thence due east crossing several water courses to the beginning; with the appurtenances thereunto belonging: to have and to hold the said messuage and tract or parcel of land with the appurtenances unto the said John and his assigns, from the first day of July, in the year aforesaid, for the term of ten years thence

next ensuing, and fully to be completed and ended; by virtue of which said demise the said John Doe entered into the said tenements with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the 2d day of July aforesaid, with force and arms, entered into the said tenements with the appurtenances, which the said Margaret Latimer, James Latimer, Elizabeth Latimer, and Margaret Latimer, jr., executors of George Latimer, and legal representatives of William Cathcart, Dorithy Dale, Edward C. Dale, Sarah Dale and Elizabeth Dale, heirs and representatives of Richard Dale, John R. Latimer, Sarah Latimer, Mary R. Latimer, Henry Latimer, and James Latimer, heirs and representatives of Henry Latimer, had demised to the said John Doe in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace and dignity of the United States; wherefore, the said John Doe saith that he is injured, and, therefore, he brings his suit, &c.

Mr. WILLIAM POTEET:

I am informed that you are in possession of, or claim title to, the demised premises in this declaration of ejectment mentioned, or some parts thereof, and I being sued in this action as casual ejector only, and have no claim or title to the same, do advise you to appear at the next term of the circuit court of the United States, in the fifth circuit for the district of North Carolina, to be held at Raleigh, on the 12th day of November next, personally, or by some attorney of that court, and then and there, by a rule of the same court, to cause yourself to be made defendant in my stead; otherwise, I shall suffer judgment thereon to be entered against me by default, and you will be turned out of possession.

Your loving friend,

RICHARD ROE.

Issued June 21st, 1828,

WM. ROANE.

Returned into court endorsed, to wit:

A true copy of the within declaration in ejectment delivered the defendant, William Poteet, a citizen of Haywood county, and on the waters of Tuckesege river, 24th June, 1828.

BEVERLY DANIEL,
Marshal of the State of North Carolina,
by SAML. McD. TATE, D. M.

On the 12th November, 1828.

JOHN DOE, on the demise of
MARGARET LATIMER and others,
vs.
RICHARD ROE.

It is ordered, by the consent of the counsel on both sides, that William Poteet be made defendant instead of the now defendant, Richard Roe, the casual ejector, and do forthwith appear at the suit of the plaintiffs, received a declaration and plead thereto at the present term the general issue, and at the trial thereupon to be had, the said defendant shall confess leave, entry, and ouster, and insist upon title only; otherwise, let judgment be entered for the plaintiff against the now defendant by default, &c.

And, therefore, the said William Poteet, by George E. Badger, his attorney, come and defend the force and injury, and says that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or any part thereof, in manner and form as the said John Doe hath above thereof complained against him, and of this he puts himself upon the country.

And the said John Doe likewise, therefore, let a jury, &c. who, &c. came on the 12th day of May now next, &c., at which day here come the parties aforesaid, by their attorneys aforesaid, and by consent of the said attorneys, day is given to the said parties touching their plea aforesaid and the issue so joined between them, until the 12th day of November now next, at which day came here the parties aforesaid, by their attorneys aforesaid, when day by the like consent is given them until the 12th day of May now next, at which day here came the parties, when day is by the like consent given until the 12th day of November now next, at which day here came the parties aforesaid, when by like consent day is given until the 12th day of May now next, when here came the parties aforesaid, by their attorneys aforesaid, when by the like consent day is given until the 12th day of November now next, at which day came the said parties, by their said attorneys, when day is given by the like consent until the 12th day of May now next, at which day came the parties aforesaid, by their attorneys aforesaid, when by like consent day is given until the 12th day of November next, at which day came the parties aforesaid, by their attorneys aforesaid, when by the like consent day is given until the 12th day of May now next, at which day came the parties aforesaid, by their attorneys aforesaid, when day is given until the 12th day of November next, at which day came the parties aforesaid, by their attorneys aforesaid, when by the like consent day is given until the 12th day of May, to wit, the 12th day of May, A. D. 1833, at which day, before the honorable John Marshall, Chief Justice of the United States, and the honorable Henry Potter, district judge of the United States for the district of North Carolina, judges of said court, here came as well the plaintiff as the defendant, by their attorneys aforesaid, when came also the following jury, to wit, Joel Sledge,

James Frelick, David Stone, Adam G. Banks, John Caruthers, Martin McPherson, James D. Johnson, William Boylan, William T. Hargrove, William A. Maddox, Thomas B. Littlejohn, and Thomas Ward, who, being elected, tried, impannelled and sworn, to say the truth of and concerning the issue aforesaid, in manner and form aforesaid joined, say, upon their oath, that the said defendant is not guilty of the trespass and ejectment laid to his charge in the declaration. Therefore, it is considered by the court that the said John Doe take nothing by his writ aforesaid, but for his false complaint against the said William Poteet in mercy, and the said William Poteet recover against the said John Doe, lessee, &c. for his costs and charges by him laid out and expended in and about his defence in this *this* behalf sustained to the said William Poteet, by the court have been allowed, and by the clerk to be taxed, and that the said William Poteet may have execution thereof, &c.

DOE, on demise of Margaret Latimer and others,
against
WILLIAM POTEET.

Be it remembered, that on the trial of the issue in this cause, the lessors of the plaintiff exhibited in evidence an instrument under the great seal of North Carolina, executed with all the formalities required by law, and purporting to be a grant to William Cathcart for the tract of land described in the declaration, bearing date the 20th July, 1796, and founded on entries made in the entry-taker's office of the county of Buncombe, in said State, in the year 1795, within the limits of said county, and it was admitted by defendant, William Poteet, that at the time of commencing this action he, the said defendant, was in possession of a part the said land, and that title (if any) which passed by the said grant had descended upon and accrued to the lessors of the plaintiff, and it was admitted by the plaintiff that the said land lay wholly within the limits of the territory specially described and set forth in the 5th section of the act passed by the General Assembly of North Carolina, in the year of our Lord one thousand eight hundred and eighty-three, entitled an act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due to the army, as reserved unto the Cherokee Indians and their nation for ever; and it being objected by the defendant that the said alleged tract was null because the land at the time of the said entries, and of said alleged grant, lay wholly within the territory so allotted to the Cherokee Indians, and within which entries and grants were prohibited by the sixth section of said act, the plaintiff, by his counsel, prayed the court to instruct the jury that, in the year 1795, when the said entries were made, and on the 20th of July, 1796, when said alleged grant was made, and the prohibitions contained in the said sixth section, and all other prohibitions under the law of North Carolina against the entry and granting of lands within the Cherokee territory, had

been repealed and were no longer in force, and that, therefore, such entries were not unlawful, and the said alleged grant was valid to pass the propositary interest of the State of North Carolina to the land comprehended therein; but the court refused to grant such instructions, and instructed the jury that the prohibitions contained in said sixth section were in full force as to all lands within the said Indian territory, to which the Indian title had not been extinguished at the time of said entries, to which refusal of the prayer of the plaintiff, to which instructions the said plaintiff excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that, according to the true construction of the treaty of Holston, made the 2d of July, 1791, the line therein described from the Occunna mountain, thence over the same with the South Carolina Indian boundary to the North Carolina boundary, ought to run with the South Carolina Indian boundary called for in the treaty of Hopewell, made on the 28th November, 1786, until it should reach the termination of the line described in that treaty, running from the North Carolina boundary to the South Carolina Indian boundary, and on reaching that line should then run with the same reversed to the North Carolina boundary; which instruction the court, being divided in opinion, refused to give, and to this refusal the plaintiff also excepts.

The said plaintiff then prayed the court to instruct the jury, that, according to the true construction of the treaty of Holston, made on the 2d of July, 1791, the line described in the fourth article of said treaty, running from the North Carolina boundary, thence north to a point from which a line is to be extended to the river Clinch, that shall pass Holston at the ridge which divides the waters that run into Little River from those running into Tennessee, ought to be run so far north, and no further than was necessary for extending therefrom a line that should pass the Holston at the said ridge, and strike the river Clinch below the next line called for in said treaty, and that of the land comprehended within the said alleged grant lay wholly to the east or right side of the line, so to be extended from the first point north of the boundary line aforesaid, whence it could be so extended, then the said land lay within the territory to which the Indian title had been extinguished by the treaty of Holston, and the same might be lawfully entered and granted: but the court, refusing said prayer, instructed the jury that the line running north from the said North Carolina boundary did not, by the treaty, stop at the first point from which the next line, as described by the treaty, could be extended, but was to stop at such point as the commissioners under said treaty might thereafter agree upon, and that, until the said point should be agreed upon, the Indian title was not extinguished, except to the land lying east of a line to be extended as aforesaid to the ridge on Holston and the river Clinch, from the farthest point north from which such a line could be extended; to the refusal of which prayer, and to which instruction, the said plaintiff excepted.

The said plaintiff also prayed the court to instruct the jury, that

the prohibitions contained in the said act of 1783 did not affect entries and grants of land *bona fide* made within territory actually occupied at the time by North Carolina, and believed to be without the Indian boundary, but which land, subsequently to the grant, was discovered to be of right within the Indian boundary; which prayer the court wholly refused, and to this refusal the said plaintiff excepted.

The said plaintiff then further prayed the court to instruct the jury, that if at the time the aforesaid entries were made, and the said alleged grant issued, the land comprehended therein lay within the territory which the people and the officers of North Carolina claimed as ceded by the treaty of Holston, over which that State, by her magistrates and officers, then exercised and claimed an unquestioned jurisdiction, in which the State had an office for receiving entries of land, within which such entries were recognized by her legislature as valid, and over the persons and lands within which she exercised the right of taxation, then the said grant was not issued in violation of the said act of 1783, but must be regarded between the State and those claiming to be grantees under her, as having been issued by lawful authority, although the subsequent marking of the lines under the United States and the Cherokees threw this land on the Indian side of the boundary, or showed that it ought to have been so originally regarded; which prayer the court also refused, understanding the term, unquestioned jurisdiction, to go no farther than to such actual jurisdiction as is stated in the other parts of the prayer; and to this refusal the said plaintiff also excepted.

The counsel for the defendant then prayed the court to instruct the jury, that, under the treaty of Holston aforesaid, the lands ceded by it passed subject to the line to be marked as prescribed in the treaty, and that such lines, so subsequently marked, was as operative as if it had been originally inserted in the said treaty; which instructions the court gave accordingly, and to which instructions the said plaintiff also excepted.

The counsel for the defendant also prayed the court to instruct the jury, that the line which had been run and marked in the year 1797, commonly called Pickens's and Hawkins's line, and which said line leaves the land described in the declaration on the western side thereof, if run and marked under the authority of the United States and the Indians, as directed by the treaty of Holston, were conclusive on all persons, and that no error in them could be shown by parole evidence; and the court, declining to give the instruction as prayed for, nevertheless instructed the jury that if the treaty was completely executed as far as respects the ascertaining and marking of the lines it prescribes, those lines would be conclusive; but unless this be proved, the court think them not conclusive: to which instruction, so given, the plaintiff also excepts.

The defendant's counsel also prayed the court to instruct the jury, that the treaty of Tellico, made on the 2d October, 1798, by its recital that the line prescribed by the treaty of Holston aforesaid, and

by the treaty of Philadelphia, made the 26th June, 1794, had been lawfully run and marked, and, by its declaration, that the lines shall be binding except as altered by the treaty of Tellico, establishes that the lines had been lawfully run, and, if not, then it recognizes the running which had been made, and thereby, if erroneous, in fact, establishes it between the parties and cures the error, and that this ratification goes back to the treaty of Holston, and makes the line thus affirmed a part of that treaty; but the court, declining to give the instruction as prayed, nevertheless did instruct the jury, that the treaty of Tellico is an admission, by the parties, that the line of the treaty of Holston had been ascertained and marked, and furnishes strong evidence that the lands reserved to the Cherokees, by the treaty of Tellico, were reserved by the treaty of Holston, but does not establish the lines of Pickens and Hawkins, if erroneous in fact; to which instruction, as given, the plaintiff doth also except.

The counsel for the defendant did further pray the court to instruct the jury, that the lands which the said treaty of Tellico recognizes as having been ceded by or reserved to the Cherokees in the treaty of Holston, are to be considered as having been so ceded or reserved respectively; which prayer the court refused, but nevertheless instructed the jury that the recitals in the treaty of Tellico, of cessions and reservations in the previous treaty of Holston, are strong evidence of the fact, but not conclusive, against prior grantees; to which instruction the plaintiff doth also except.

The defendant's counsel also prayed the court to instruct the jury, that the North Carolina boundary, referred to in the fourth article in the treaty of Holston, is not the 35th degree of north latitude, as it has been since ascertained, but the then reputed line of North Carolina, if there was such a line; and the court gave this instruction as prayed; to which instruction the plaintiff doth also except.

And the counsel of the defendant did also pray the court to instruct the jury, that if the line runs by Pickens and Hawkins, if run under the authority of the United States as the line of the treaty of Holston, and if examinable, must be taken to be right unless disproved; and the court gave the instruction as prayed; to which instruction the plaintiff doth also except.

And it is ordered by the court, and agreed by the parties, that the said prayers, the said instructions, and the said exceptions, be all entered of record, and be made a part of the proceedings in this case.

WILLIAM GASTON, *for Plaintiff.*
GEORGE E. BADGER, *for Defendant.*

A writ of error in this case, returnable to the next term of the Supreme Court of the United States, being produced by the plaintiff, the same is allowed; the plaintiff files his assignment of errors and prayer for reversal of judgment, enters into bond, with surety, for prosecuting the said writ of error to the satisfaction of the court, as required by law; the defendant admits service of citation on said writ of error, and the parties agree and admit that the matter in dispute

exceeds the sum of two thousand dollars; wherefore, it is ordered by the court, that an authenticated transcript of the record of this suit, and all the proceedings therein, and of the admissions of the parties, and of the assignment of errors, and prayer of reversal by the plaintiff, and of the bond for prosecuting the said writ of error, be annexed and returned with the said writ of error to the Supreme Court of the United States.

Know all men by these presents, that we, John Brown and William Gaston, are held and firmly bound unto William Poteet in the just and full sum of five hundred dollars, to which payment well and truly to be made unto the said Poteet, his executors, administrators, and assigns, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 23d day of May, 1833.

The condition of the above obligation is such, that whereas a judgment hath been rendered in favor of the defendant, in a certain suit lately pending in the circuit court of the United States for the district of North Carolina, and determined at the term thereof, which commenced on the 12th day of the present month, in which suit John Doe, on the demise of Margaret Latimer and others, was plaintiff, and the said Poteet defendant; and whereas the said plaintiff hath sued forth a writ of error from said judgment to the Supreme Court of the United States; now, in case the said plaintiff in error shall prosecute his said writ to effect, or in case he fail to make his plea good, shall answer all damages and costs, the *the* above obligation to be void, otherwise in force.

(Signed,) JNO. BROWN, [SEAL.]
WILL. GASTON, [SEAL.]

Sealed and delivered in open court, in the presence of
WM. H. HAYWOOD, *Clerk.*

UNITED STATES OF AMERICA, *North Carolina District, Circuit Court, fifth circuit.*

I, William H. Haywood, clerk of the circuit court of the United States for the district of North Carolina, do hereby certify the foregoing to be a copy of the record and proceedings in the suit in ejectment in this court, John Doe, lessee of Margaret Latimer and others, against William Poteet, together with a copy of the bond filed for the prosecuting the writ of error hereunto attached.

Given under my hand and seal of office, this 8th day of January, A. D. 1834.

WM. H. HAYWOOD, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the judges of the circuit court of the United States for the district of North Carolina, greeting: [SEAL.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John Doe, lessee of Margaret Latimer and others, plaintiff, and William Poteet, defendant, a manifest error hath happened, to the great damage of the said John Doe, lessee of Margaret Latimer and others, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable John Marshall, Chief Justice of the said Supreme Court, the first Monday of August, in the year of our Lord one thousand eight hundred and thirty-three.

WM. THOS. CARROLL,
Cl'k Sup. C't U. S.